



Corey Brettschneider, *When the State Speaks, What Should It Say? How Democracies Can Protect Expression and Promote Equality*

When the State Speaks, What Should It Say? How Democracies Can Protect Expression and Promote Equality by Brettschneider, Corey

Review by: Katharine Gelber

Ethics, Vol. 124, No. 1 (October 2013), pp. 177-181

Published by: [The University of Chicago Press](#)

Stable URL: <http://www.jstor.org/stable/10.1086/671405>

Accessed: 02/10/2015 03:03

Your use of the JSTOR archive indicates your acceptance of the Terms & Conditions of Use, available at <http://www.jstor.org/page/info/about/policies/terms.jsp>

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact support@jstor.org.



The University of Chicago Press is collaborating with JSTOR to digitize, preserve and extend access to *Ethics*.

<http://www.jstor.org>

BOOK REVIEWS

Brettschneider, Corey. *When the State Speaks, What Should It Say? How Democracies Can Protect Expression and Promote Equality*.

Princeton, NJ: Princeton University Press, 2012. Pp. 216. \$35.00 (cloth).

This book seeks to find a third way between what are typically positioned as two opposed views on the contested issue of freedom of speech versus hate speech. The first is the view that freedom of speech mandates the protection of individuals' right to express their views without distinction as to content and that, therefore, in a democracy we must tolerate even those views that themselves are so harmful to equality as potentially to undermine the democratic fabric. Even the worst excesses of hateful speech must be left unregulated. Corey Brettschneider calls this the 'Hateful Society' dystopia. He contrasts this to the 'Invasive State' dystopia, in which the tangible and manifest harms of hate speech are acknowledged and then sought to be addressed through hate speech laws that, typically, punish the hate speakers for their views through criminal law. Brettschneider posits that these two dystopias are often described as the neutralists versus the prohibitionists, or alternatively as the United States (in which First Amendment jurisprudence has typically rendered hate speech laws invalid on constitutional grounds) versus European liberal democracies (which typically prohibit egregious hate speech through criminal law).

The third, and alternate, way forward that Brettschneider favors is one he calls 'democratic persuasion', in which both the goal of noninterference with hate speech and the goal of preserving key elements of democratic governance are met. This is achieved by on the one hand preserving the free speech rights of hate speakers, by not regulating their views via criminal law, and on the other hand responding to the views of hate speakers by using the state's considerable expressive power to criticize, condemn, and defund hate speakers and their organizations. The power of democratic persuasion is to be used strictly noncoercively, in order to preserve the rights of hate speakers, who are as entitled to treatment as free and equal citizens as are their targets and the polity as a whole.

Indeed, the entire framework of democratic persuasion rests on the idea of free and equal citizenship. With this as the state's goal, it is prevented from coercively interfering in hate speakers' right to speak since they (just as nonhate speakers do) possess freedom of speech, freedom of association, and freedom of conscience. But when the state decides how it might validly respond to speech that is so hateful that it undermines free and equal citizenship, it must do so in a manner that is itself consistent with the maintenance of free and equal citizenship and that simultaneously seeks to promote the values of free and equal

For permission to reuse, please contact journalpermissions@press.uchicago.edu.

citizenship, by explaining and articulating the reasons why rights should be respected. This reasoning would seek to convince citizens of the rightness of free and equal citizenship. "These democratic values should be adopted by citizens and promoted by the state, because they ground the legitimacy of the government and justify protecting rights" (4). The regime thus produced is termed a 'value democracy', a nonneutral theory of democracy that integrates the neutral treatment of hate speech with nonneutral behavior of the state in relation to that speech.

One of the original components of Brettschneider's argument, resting as it does in a context of First Amendment jurisprudence, is the idea that the state can be overtly nonneutral in deciding whom to criticize, which organizations to condemn, and to which organizations it ought to grant subsidies and tax privileges (chaps. 4 and 5). In an argument that explicitly seeks to contradict elements of current First Amendment doctrines on what the state may say when it acts as the speaker (when it may say what it wishes to) and what the state may say when it funds private organizations to speak (when it must maintain a content-neutral perspective), Brettschneider argues that the overriding consideration for the state in deciding what to say when it 'speaks' is whether its acts instantiate the goal of free and equal citizenship. The state is therefore justified in granting funds and tax privileges to organizations that support the goals of free and equal citizenship and equally justified in denying funds and tax privileges to organizations (like the Westboro Baptist Church) whose doctrine and policies seek to deny free and equal citizenship. Although grants, subsidies, and tax status may be denied such organizations, their freedom-of-speech rights are not therefore interfered with since they may still hold meetings, seek to recruit members, and present their views to the public. This also prevents the state from being seen to be complicit in the ideas and values of those who oppose free and equal citizenship, which pure noninterference might suggest (43).

The state's role as a democratic persuader is posited as necessary in part because Brettschneider argues that the first process that should be undertaken to realize free and equal citizenship in the context of hate speech is that individuals whose own views are hostile to free and equal citizenship should engage in 'reflective revision' of their own views, measured against that benchmark (chap. 2). This admonition is required in relation to all views of 'public relevance', including those that may occur in a sphere traditionally thought of as 'private', such as the family or a nonprofit organization. Brettschneider seeks to replace the spatial metaphor that has sought to distinguish public from private in terms largely related to place with instead a conception of the activities that are publicly relevant. Therefore, in any space or place, "beliefs and practices that conflict with the ideal of free and equal citizenship can be of public concern, and should be changed to make them compatible with democratic values" (24). He describes this conception of public relevance as a "thin" one (37), one that does not submit all of private life to public scrutiny but only those elements relevant to free and equal citizenship.

The idea of reflective revision, whereby citizens would reflect on the ways in which their own values cohere, or do not cohere, with achieving free and equal citizenship, is highly utopian. Brettschneider's attempt to outline an extralegal response to discrimination and marginalization is to be commended in this area

of scholarship since it does seek to reach beyond the binary divide that is often presented in the literature between neutralists and prohibitionists. There have been other important contributions to this genre of scholarship (e.g., Eric Heinze and Gavin Phillipson, *Debating Hate Speech* [Oxford: Hart, 2013]; Katharine Gelber, “‘Speaking Back’: The Likely Fate of Hate Speech Policy in the United States and Australia,” in *Speech and Harm: Controversies over Free Speech*, ed. Ishani Maitra and Mary Kathryn McGowan [Oxford: Oxford University Press, 2012]; Owen Fiss, *The Irony of Free Speech* [Cambridge, MA: Harvard University Press, 1996]) that unfortunately are not examined in this volume, but nevertheless a consideration of extralegal responses is important and often overlooked. To that extent, this part of the argument makes an important contribution.

However, while Brettschneider argues carefully and convincingly why reflective revision is important and ought to be undertaken, he does not enter into a consideration of how this might be achieved. He suggests that citizens are obligated to do so (he also says it is “incumbent” upon them; 54). This is clearly a moral obligation, not a legal one, since coercion is not permitted to force citizens to undertake reflective revision; rather, citizens must engage in it voluntarily. He calls on citizens to criticize their own and others’ discriminatory behavior and “seek to transform the beliefs behind it” (42). The purpose of reflective revision is for citizens to reevaluate their own beliefs (58), to render them consistent with public actions that seek to achieve the ideal of free and equal citizenship (37). Brettschneider notes that their beliefs may not change, but as long as their public actions are guided by the principles of free and equal citizenship, this is enough to have achieved reflective revision. Full voluntary examination of all one’s concepts and public values is to be desired, but it is not required (60). This undertaking is justified in order to preserve democratic congruence and legitimacy of the state, empirical stability, interconnection, and public trust in the fact that state-mandated policies will be adhered to at the coal-face of political interactions. Brettschneider argues that it is essential that the choice of whether to enter into reflective revision—or if one does make the choice, to change one’s values—must be entirely noncoercive. Where reflective revision fails, as he acknowledges it may, the state’s role as democratic persuader is brought to bear. While acknowledging then that reflective revision cannot be achieved by citizens on their own, and that this process is buttressed by the state’s role as speaker, there is little engagement with the question of how this reflective revision is to be achieved, other than to stress the role of reasoning and persuasion. Had Brettschneider engaged with the question of how this might be achieved more deeply (e.g., by engaging with the literature on speech-act theory), this component of his argument may have been rendered more convincing. As it stands, he instead emphasizes the voluntary nature of this process, stressing that citizens can opt out (63) since to do otherwise would fail to respect them as free and equal.

There are other bases on which to commend this book. First, it has a helpful clarity on the nature of hate speech itself, defining ‘hateful viewpoints’ not as bound up with emotion but instead by the fact that they express “an idea or ideology that opposes free and equal citizenship” and is not a direct threat (75). This is useful in a field in which the term ‘hate speech’ has led to some misunderstanding over its nature and a primary association with a psychological ‘hatred’ rather than discrimination or marginalization. Jeremy Waldron has also recently

made the point (*The Harm in Hate Speech* [Cambridge, MA: Harvard University Press, 2012]) that the term 'hate speech' implies that what is important is how targets feel about what is said to them, when what is actually at stake is a harm to human dignity. Where the marginalization or harm to human dignity element of the hate speech act is elided with psychological dislike, it makes it difficult to prevent the extension of hate speech laws to all kinds of dislikes and disagreements—which can seriously undermine the concept itself and, by extension, the validity and legitimacy of hate speech laws in those jurisdictions that have them.

Second, this book differentiates between viewpoint neutrality, which is applied to the extension of freedom-of-speech rights to all citizens on the ground that they must be treated as free and equal citizens, and neutralism, which Brettschneider rejects in favor of a nonneutral state approach to its own persuasive (including funding-based) powers. There is a particular clarity in using this distinction, which is useful to the literature.

A weakness of the book, however, lies in its contextual and conceptual residence inside a particularly US-informed view of equality. Brettschneider argues throughout the book for a particular conception of equality, eruditely tackling some hard cases and previous Supreme Court decisions from the perspective of his democratic persuasion, arguing where and when it would be justified for the state not to intervene so as to protect individuals and respect them as free and equal citizens or to intervene so as to preserve those same values. Yet other jurisdictions view equality quite differently. To take just one example, Canada has both criminal hate speech laws at a federal level and civil hate speech laws at provincial level. In the famous *R v. Keegstra* hate speech case, which considered the fate of a high school teacher who communicated anti-Semitic statements to his students, the Supreme Court of Canada decided that the hate speech prohibition in the Canadian criminal code (s319[3][a]), while it did infringe on the freedom of expression outlined in the Canadian Charter of Rights and Freedoms (s11[d]), was a reasonable limit on that right as permitted in the Charter (s1). In considering its reasonableness, the court noted that s1 of the Charter "operates to accentuate a uniquely Canadian vision of a free and democratic society" (*Keegstra*, 51). The court agreed that the legislation in question was designed to "ensure the equality of all individuals in Canadian society" and that the "harms caused by this message run directly counter to the values central to a free and democratic society." The court argued that in restricting hate speech in criminal law, "Parliament is . . . seeking to bolster the notion of mutual respect necessary in a nation which venerates the equality of all persons" (63). It argued further that preservation of a multicultural society could not be achieved by giving "free rein" to the promotion of hatred, which threatens the value of equality (65). The approach of the Canadian Supreme Court raises serious doubts as to the portability of Brettschneider's argument to jurisdictions not immersed in a particularly US-informed view of how to instantiate and achieve equality.

This is an interesting and well-argued book, although it suffers from an excess of repetition, particularly in the early chapters. It also presents an oversimplified view of the 'Hateful Society' and the 'Invasive State', which does not, for example, consider those jurisdictions such as Canada and Australia that have implemented civil law responses to hate speech, with a view to avoiding the worst excesses of the invasive state that Brettschneider criticizes. The book expands on

Brettschneider's previous work ("When the State Speaks, What Should It Say?" *Perspectives on Politics* 8 [2010]: 1005–19) in important ways, including his consideration of religious freedom. It is an important addition to the bookshelf of any scholar or student considering the interchange between freedom of speech and hate speech regulation.

KATHARINE GELBER
University of Queensland

Finkelstein, Claire; Ohlin, Jens David; and Altman, Andrew, eds. *Targeted Killings: Law and Morality in an Asymmetric World*.
Oxford: Oxford University Press, 2012. Pp. xx+496. \$95.00 (cloth).

Pause and rewind to September 11, 2001. Imagine that a group of radical jihadists have successfully executed a highly coordinated, multitarget terrorist attack on US soil, the most deadly in modern American history. Imagine that the terrorist mastermind considered to be behind the attacks is yet to be apprehended, thought to be actively planning further terrorist attacks, and managing a vast network of terrorist cells across numerous sovereign nations in the Middle East and South East Asia. In order to avoid capture, he hides far from any conventional battlefield. He does not wear the uniform that traditionally marks combatant status, nor does he carry a weapon that could signal that he is prepared to take part in hostilities. He is, in all likelihood, taking refuge in a cave or otherwise trying to camouflage himself among men, women, and children who may not share or even know of his cause. Advances in communications technologies allow the terrorist to continue spreading his dangerous message to other extremists who then go on to perpetrate further acts of deadly terrorism. Yet the same technological advances allow the US military and intelligence bodies to improve their efforts to hunt the terrorist leader and others in his command chain. If the US government were to track, target, and kill those individuals, would such action comply with international regulations, the law of armed conflict, and contemporary principles of just-war theory?

Let us now continue the hypothetical and fast-forward more than a decade. You are now in the unenviable role of President of the United States of America and have inherited two largely unpopular and costly wars from an equally unpopular two-term president. After some internal discussion and debate, your national security team approaches you and advises that they may know the whereabouts of a known terrorist. The tactics taken by this individual and those close to him suggest that while he is not among its most active members, it is probable that he is a high-level member of Al Qaeda, supporting communications, logistics, and the recruitment and inculcation of radical ideals on new members and thus likely to pose a more indirect though equally significant and real threat to the United States, its citizens, and those of its coalition partners and various other innocent people. You are presented with four options. You can choose not to act on the information; wait for a more concrete identification; bomb the sparsely populated location where the suspected terrorist is thought to be hiding; or dispatch a small, elite force of special operations soldiers to either capture or kill the